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No. 90-859

In the Supreme Court of the United States

OCTOBER TERM, 1990

BROWER'S MOVING & STORAGE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by repudiating the terms of its collective-bargaining agreement with the Union.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A5) is unreported, but the judgment is noted at 914 F.2d 239 (Table). The decision and order of the National Labor Relations Board (Pet. App. B1-B27) are reported at 297 N.L.R.B. No. 28.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1990. The petition for a writ of certiorari was filed on November 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1951, petitioner recognized Local 814, International Brotherhood of Teamsters (the Union), as the exclusive bargaining representative of its employees. Pet. App. A4, B3, B17. Since then, petitioner and the Union have entered into a string of three-year collective-bargaining agreements, the most recent of which was effective by its terms from April 1, 1986, until March 31, 1989.[1] Pet. App. B2-B3 & n.1, B5, B17.

Petitioner's agreements with the Union required it to make contributions to the Teamsters Local 814 Welfare, Pension and Annuity Funds (the Funds) on behalf of all covered employees, and to provide the Funds with the names of those employees and their hours worked. Pet. App. A3, B4-B5. Petitioner reported and made the required contributions for only a select few employees, including members of the Brower family; the existence of other employees was never made known to the Union or the Funds. *Id.* at B3-B4, B18. Petitioner also failed to abide by the wage, holiday, vacation, union security, and other terms of its agreements with the Union. *Id.* at B3. The Union remained unaware of all of these breaches. *Ibid.*

From 1951 to 1954, monthly dues were collected in person by a union representative. Since then, no representative has visited petitioner's workplace; no grievances were ever filed, and no shop steward was ever appointed. However, the Union has had contact with petitioner several times. In 1956, the Union attempted to prohibit one of petitioner's owners from working alongside members of the bargaining unit. Pet. App. B3-B4, B20. In 1968, when petitioner

[1] There were no direct negotiations between petitioner and the Union, but the parties executed a series of Memorandums of Agreement by which petitioner accepted the terms of a collective bargaining agreement negotiated between the Union and an employer association (of which petitioner was not a member). Pet. App. B17.

wished to arrange pension coverage for a previously unidentified employee, the Union required the payment of back dues and Fund contributions. *Id.* at B4, B18. In 1983, the Union asked petitioner to provide an updated seniority list. Petitioner, however, identified only two of its employees, both Brower family members, and omitted the rest.[2] *Id.* at B7, B18-B19.

In 1988, petitioner challenged the Union's status as representative of the employees by filing with the Board an election petition, in support of which petitioner submitted an affidavit asserting its non-compliance with its existing collective bargaining agreement with the Union. Pet. App. B5; C.A. App. 71-78. In response, the Union filed an unfair labor practice charge alleging that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by repudiating the agreement, by failing to make required Fund contributions and by failing to honor the other terms of the agreement. The Board's General Counsel issued a complaint against petitioner based on that charge.

2. The administrative law judge ordered the complaint dismissed on the ground that the parties did not have a valid collective bargaining agreement. Pet. App. B16-B27. The judge determined that "between 1951 and December 1987,

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[2] The Funds took action against petitioner several times. In 1981, they sued petitioner in state court to recover delinquent contributions for the period from 1975 to 1981. After that suit was settled, the Funds sent monthly notices of due and past due amounts. In 1987, after an audit, the Funds sued again in federal district court to recover delinquencies from 1983 to 1987. Pet. App. B4. The district court granted summary judgment for the Funds, and the court of appeals affirmed. See *Benson* v. *Brower's Moving & Storage, Inc.*, 726 F. Supp. 31 (E.D.N.Y. 1989), aff'd, 907 F.2d 310 (2d Cir.), cert. denied, 111 S. Ct. 511 (1990).

the Union did nothing to enforce its contract with Respondent." *Id.* at B26. Thus, the Union did not enjoy the benefit of the general rule that a union is presumed to represent a majority of the workers during the life of a collective-bargaining agreement, and therefore, while the agreement is in effect, the contract cannot be repudiated on the ground that the union has lost its majority support. Relying on an exception to that rule articulated in *Ace-Doran Hauling & Rigging Co.*, 171 N.L.R.B. 645 (1968), the ALJ determined that the parties had not intended their agreement to be an effective contract. Pet. App. B22.

The Board disagreed and ordered petitioner to honor its agreement. It held that *Ace-Doran* established only "a narrow exception to [the] general rule" that a union is presumed to represent a majority of the employees during the life of a contract. That exception is applicable in circumstances where the bargaining unit "was not defined with sufficient clarity," and where the parties' practice demonstrated that they "did not intend [the agreements] to be effective collective-bargaining agreements." Pet. App. B6. Here, the Board found, the unit was adequately defined,[3] and there was no evidence that the parties lacked such intent. Rather, "the Union has clearly taken affirmative steps to enforce its contract over the years,"[4] *id.* at B7, and petitioner's actions showed its intent to be bound by the contract.[5] *Id.* at B8 n.11.

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[3] There was no contention to the contrary.

[4] These affirmative steps included three years of monthly, in-person dues collection from 1951 to 1954; the Union's 1956 attempt to forbid an owner from working alongside unit members; its 1968 effort to obtain back dues and Fund contributions for a newly identified unit member; and its 1983 request for a seniority list. The Union's active pursuit of the present case also demonstrated its efforts at contract enforcement.

[5] The Board considered petitioner's signing of an agreement every three years, its regular dues and Fund payments for certain employees,

Although "no steward was appointed and no grievances filed," *id.* at B7, that was petitioner's fault, as it "never told its unit employees they were represented," and petitioner misled the Union by "den[ying] knowledge concerning the unit employees when * * * asked."[6] *Ibid.*

3. The court of appeals summarily enforced the Board's order. Pet. App. A4-A5. The court found that "substantial evidence on the record as a whole" supported the Board's finding that "the parties' conduct over a period of years did not negate the intent to form a valid collective bargaining agreement or establish that the Union abandoned the contract or acquiesced in repudiation of it." *Id.* at A4.

ARGUMENT

As the court below held, substantial evidence supports the Board's finding that the parties intended to execute genuine and binding collective bargaining agreements. Accordingly, further review by this Court is not warranted.

1. Under Section 8(a)(5) of the Act, it is an unfair labor practice to repudiate a collective bargaining agreement during its stated term. *Allied Chem. Workers, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185-187

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its effort in 1968 to obtain pension coverage for an employee, and its 1983 request to the Union for certain information. The Board also found the Funds' suits against petitioner in 1981 and 1987 "consistent with a finding that there was * * * a valid enforceable * * * agreement." *Id.* at B7.

[6] The Board also rejected the ALJ's alternative finding (Pet. App. B26 n.3) that the Union had abandoned the contract and the unit, noting that, "[t]o preserve the validity of a contract for contract bar purposes, a recognized union need only show that it is willing and able to represent the covered employees at the time its status is called into question." The Board pointed out that "[t]here is no evidence that the Union is either unwilling or unable to represent the [petitioner's] employees covered by the contract." *Id.* at B8-B9 n.12.

(1971). In *Ace-Doran Hauling & Rigging Co.*, 171 N.L.R.B. 645 (1968), the Board recognized a narrow exception to that general rule: when the parties did not intend their agreement to be a valid contract, as evidenced by a failure sufficiently to define the bargaining unit, and when a course of practice demonstrated the agreement to be a "members only" agreement—*i.e.*, an "arrangement[] * * * to check off dues, health and welfare, and pension payments for union members." *Ace-Doran*, 171 N.L.R.B. at 646. Even if a union has not vigorously enforced its agreement, the Board will not find that the union has abandoned the contract or the employees if the union is willing and able to represent the covered employees at the time its status is called into question. *Loree Footwear Corp.*, 197 N.L.R.B. 360 (1972); *Road Materials, Inc.*, 193 N.L.R.B. 990 (1971); *Pioneer Inn Assoc.*, 228 N.L.R.B. 1263, 1264 (1977), enforced, 578 F.2d 835 (9th Cir. 1978).[7]

Petitioner does not deny that it repudiated the bargaining agreement during its term; there is no question that the bargaining unit was sufficiently defined, Pet. App. B7; and the ALJ found that the agreement was not a "members only" contract, *ibid.*; see *id.* at B26 n.3. The narrow issue before the Board was whether the parties intended their agreement to be valid. Significantly, the Board accepted the administrative law judge's essential findings of fact; the Board simply drew different inferences from them. Such reasonable factual inferences are entitled to deference. See *NLRB* v. *United Ins. Co.*, 390 U.S. 254, 260 (1968); *Midwest Regional Joint Bd., Amalgamated Clothing Workers* v. *NLRB*, 564 F.2d 434, 438 (D.C. Cir. 1977). The only question now presented is whether substantial evidence

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[7] Here, there is no dispute that the Union is "willing and able" to represent the employees. See Gov't C.A. Br. 14; Pet. App. B9 n.12.

supports the Board's inference that petitioner and the Union had the intent to enter into a valid contract.

As the court of appeals held, substantial evidence does support the Board's view that the contract was not a sham. For the first three years of the contract, a Union officer made monthly visits to petitioner's place of business to collect dues and Fund contributions. Every three years after that, the Union proffered a contract, which petitioner signed each time. Dues and Fund payments were made consistently for those employees petitioner chose to identify. In 1956, the Union attempted to enforce the contract provisions by forbidding managers and unit members from working together. In 1968, petitioner approached the Union to enroll a previously unidentified employee, and the Union required the payment of back dues. In 1981, petitioner and the Funds settled a lawsuit over delinquent contributions. In 1983, the Union requested an updated seniority list, and petitioner requested some information from the Union. Finally, when petitioner repudiated the 1986 agreement, the Union took prompt action. These actions amply support the Board's conclusion that both parties intended their agreements to be valid. To be sure, the Union's efforts at contract enforcement were less than vigorous, but as the Board found, that was primarily due to petitioner's deceitfulness toward both the Union and its own employees. Pet. App. B7.

2. Petitioner contends (Pet. 9-18) that the Board relied for its findings on actions not of the Union but of the Funds, thereby creating an agency relationship between the two, in violation of Section 302(c)(5) of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 186(c)(5) ~~(LMRA),~~ and Section 404(a)(l) of the Employee Retirement Income Security Act of 1974, (ERISA), 29 U.S.C. 1104(a)(l).

This argument misconstrues the Board's reference to the Funds' activities. The Board found that the actions of the parties themselves showed their agreement to be valid. It

then went on to invoke the Fund's activities only to note that they were "consistent with a finding that" the parties had a valid, enforceable agreement. Pet. App. B7. That conclusion is certainly true: the Funds were entitled to contributions only through the collective bargaining agreement, and the extent to which petitioner complied with its agreement to contribute demonstrates its intent to be bound by that agreement. Thus, the Board's findings were adequately based on petitioner's and the Union's own behavior.[8]

Petitioner also errs in arguing (Pet. 19-22) that the Union was obliged to demand bargaining. Given the undisputed fact that petitioner signed an agreement every three years since 1951, there was simply nothing to bargain about—the terms of employment had already been negotiated and agreed upon, and it would make no sense to demand bargaining when there is already an agreement.[9] Since petitioner repudiated its most recent agreement with the Union while the agreement was still in effect, the Union had no opportunity to demand bargaining. After petitioner filed an election petition with the Board with an affidavit that it had not been complying with the contract, the Union appropriately responded by filing the instant unfair labor practice charges.[10]

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[8] Petitioner's discussions (Pet. 11-18) of the standard of review and of the relationship between the Union and the Funds under LMRA and ERISA are therefore irrelevant.

[9] Petitioner's argument that it never bargained personally with the Union is immaterial: the Union did bargain with a trade group, and by repeatedly accepting the terms of those agreements (by signing the memorandums of agreement), petitioner expressed its satisfaction with them.

[10] The cases cited by petitioner on this point are inapposite. In *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 294-296 (1939), the union failed to request bargaining over a renewal agreement after the expiration of the original collective-bargaining agreement. In *NLRB*

Finally, petitioner's contention (Pet. 23-28) that the Board's decision conflicts with the *Ace-Doran* line of cases ignores crucial factual differences between those cases and this one. In each of those cases, unlike this one, the Board found that the bargaining units were so ill-defined as to preclude an inference that the parties intended their agreements to be genuine. See *Ace-Doran,* 171 N.L.R.B. at 645; *Glenlynn, Inc.,* 204 N.L.R.B. 299, 308-309 (1973); *Bender Ship Repair Co.,* 188 N.L.R.B. 615, 616 (1971); see also *NLRB* v. *West Sand & Gravel Co.*, 612 F.2 1325, 1333 (1st Cir. 1979).[11] Further, in all of those cases the union knowingly acquiesced in the employer's noncompliance with the agreement or with its application solely to union members or to favored employees. Here, in contrast, the Board found that the Union did not know of petitioner's non-compliance, largely because it was misled by petitioner.[12] The Board's decision is therefore consistent

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v. *Island Typographers, Inc.*, 705 F.2d 44, 46-47, 49 (2d Cir. 1983), the parties were involved in negotiations for a new contract when the employer announced unilateral changes in employment conditions. The court found that the union had waived its right to bargain because it did not request bargaining over those changes. In *NLRB* v. *Spun-Jee Corp.*, 385 F.2d 379, 380, 383 (2d Cir. 1967), the refusal to bargain occurred during negotiations for a successor multi-employer contract that the employer refused to execute. In *W.W. Grainger, Inc.* v. *NLRB*, 860 F.2d 244, 248 (7th Cir. 1988), the governing agreement did not cover the change at issue. In *American Buslines, Inc.*, 164 N.L.R.B. 1055, 1056 (1967), the expiring contract "contemplate[d]" the changes at issue "without consultation with the [u]nion."

[11] *Weber's Bakery*, 211 N.L.R.B. 1 (1974), involved an employer with sufficiently defined bargaining units, but the majority of employees were high school students who worked part-time, and the ALJ determined that the collective bargaining agreement was merely a dues check-off for the few full-time union employees.

[12] Petitioner claims (Pet. 25-28), that the Board "attempts to distinguish and depart from the application of" *Ace-Doran* by relying

with its prior decisions and the court of appeals correctly sustained the Board's order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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on *Pioneer Inn Assoc.*, 228 N.L.R.B. 1263-1264 (1977), enforced, 578 F.2d 835 (9th Cir. 1978), and *Mr. Clean of Nevada, Inc.*, 288 N.L.R.B. 895 (1988). In fact, those cases were simply relied on by the Board for the propositions that a union willing and able to represent employees had not abandoned them, that mid-term repudiation of an agreement ordinarily constitutes a violation of Section 8(a)(5), and that while an agreement is in effect, the Union is presumed to represent a majority of the workers. See Pet. App. B5 n.4, B8 n.12.

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